UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1792

MASSACHUSETTS SCHOOL OF LAW
AT ANDOVER, INC.
v.
AMERICAN BAR ASSOCIATION; LAW SCHOOL ADMISSION SERVICES, INC.; LAW SCHOOL ADMISSION COUNCIL; THE ASSOCIATION OF AMERICAN LAW SCHOOLS, INC.; JAMES P. WHITE; NINA APPEL; JOSE R. GARCIA-PEDROSA; LAURA N. GASAWAY; FREDERICK M. HART; RUDOLPH C. HASL; CARL C. MONK; R.W. NAHSTOLL; HENRY RAMSEY, JR.; NORMAN REDLICH; JOHN E. RYAN; GORDON D. SCHABER; PAULINE SCHNEIDER; STEVEN R. SMITH; CLAUDE R. SOWLE; ROBERT A. STEIN; RENNARD STRICKLAND; ROY T. STUCKEY; LEIGH H. TAYLOR; FRANK K. WALWER; SHARP WHITMORE; PETER A. WINOGRAD

Massachusetts School of Law at Andover, Inc. ("MSL")
Appellant.

BEFORE: BECKER, MANSMANN, and GREENBERG,
Circuit Judges.

(Filed February 28, 1997)

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OPINION OF THE COURT

GREENBERG, *Circuit Judge*.

This case is before this court on appeal from an order of the district court granting summary judgment on all counts to the appellees in this antitrust action brought against them by the Massachusetts School of Law at Andover, Inc. ("MSL"). The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337, and this Court has jurisdiction under 28 U.S.C. § 1291. This appeal principally presents a number of questions regarding the scope of immunities from the antitrust laws and related antitrust discovery issues. An examination of the parties and conduct in question is first necessary.

I. FACTUAL AND PROCEDURAL HISTORY

A. *The Parties*

MSL has been operating a law school in Massachusetts since 1988. The Board of Regents of Massachusetts authorized MSL to grant the *J.D.* degree in 1990. This authority allowed MSL's graduates to take several bar examinations, including that in Massachusetts. MSL has the stated policy of providing low-cost but high quality legal education and attracting mid-life, working class, and minority students. MSL facilitates this policy with its admissions procedure and a tuition of $9,000 per year. Many of MSL's policies and practices conflict with American Bar Association ("ABA") accreditation standards, and MSL aggressively has sought changes in those standards.

The ABA, a national professional organization of attorneys

whose membership is open to members of any bar in the United States, has been concerned with legal education and bar admissions throughout its history. In 1921, through its Section of Legal Education and Admissions to the Bar (the "Section"), the ABA first developed standards of accreditation for legal education programs. The ABA petitioned state supreme courts to rely on its accreditation decisions in connection with bar admission decisions. Now, all 50 states and the District of Columbia consider graduation from an ABA-accredited law school sufficient for the legal education requirement of bar admission. App. at 1396-1409. The United States Secretary of Education considers the Council of the Section to be the national agency for accreditation of professional schools of law and a reliable authority concerning the quality of legal education. App. at 3378. The ABA informs the states of its accreditation decisions and annually sends them the *Review of Legal Education in the United States*, the ABA accreditation standards, and any proposed revisions of the standards. During the period at issue, there were 177 ABA-accredited law schools in the United States and over 50 unaccredited schools with some form of state approval such as MSL enjoys. The ABA consistently has opposed attempts to change or waive bar admission rules to allow graduates of schools not accredited by the ABA to take the bar examination. *See, e.g.*, app. at 3623-53.

Many states have methods of satisfying the legal education requirement other than graduation from an ABA-accredited school. These methods include legal apprenticeship, practice in another state, and graduation from a school approved by the American Association of Law Schools ("AALS") or a state agency. The AALS is an association of 160 law schools

which serves as a learned society for law schools and legal faculty and as a representative of the law school community with the federal government and other education organizations. Furthermore, in every state, a bar applicant or law school can petition the bar admission authority for revision or waiver of the rules. MSL won a waiver of New Hampshire's rules to allow its graduates to take the bar in 1995, and has filed petitions seeking similar relief in Connecticut, Maine, New York, and Rhode Island. Maryland and Washington, D.C. have granted petitions of graduates of MSL to take the bar. MSL graduates can take the bar examination immediately after graduation in California, Massachusetts, New Hampshire, Vermont and West Virginia, and in 12 other states after practicing in another state first.

The ABA allows graduates of non-accredited schools to join the ABA once they are admitted to a bar and does not prohibit its members from hiring or otherwise dealing with graduates of such schools. The ABA does not prevent its members from teaching at non-ABA-accredited schools, but it does not allow its accredited schools to let students transfer credits from unaccredited schools or to accept graduates of unaccredited schools into graduate programs.

ABA accreditation is open to any law school that applies and meets the ABA standards. The ABA grants provisional accreditation to schools that substantially comply with its standards and promise to comply fully within three years. An Accreditation Committee makes an initial evaluation of a school for provisional accreditation and gives a recommendation to the Council of the Section. The Council then makes a recommendation to the ABA House of

Delegates, which has the ultimate decision-making authority.

A law school must have been teaching students for five years and graduated three classes to be eligible for AALS membership. The AALS holds an annual meeting, professional conferences and workshops,[1] and publishes the *Journal of Legal Education*. All of its current members are ABA-accredited, but accreditation is neither necessary nor sufficient for membership approval. The AALS accredits schools in the sense that it determines whether a school meets its membership requirements, but it has accreditation standards and procedures separate from those of the ABA. The AALS conducts a site visit, independently of the ABA, when a school applies for membership, and it conducts periodic visits after membership, usually jointly with the ABA if the school is ABA-accredited. The AALS is not involved with site inspections for provisional ABA accreditation, such as the one the ABA undertook at MSL.

The Law School Admissions Council, Inc. ("LSAC") is the successor organization to the Law School Admission Council and Law School Admission Services, Inc. The LSAC, as have its predecessors, administers the Law School Admissions Test ("LSAT"). The LSAC is not affiliated formally with either the ABA or the AALS and does not participate in the ABA accreditation process. Membership in the LSAC is open to any United States law school that (1) requires that

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[1] The AALS does not prohibit non-members from attending these conferences, and representatives of MSL have attended them, even though MSL is not a member and never has applied for membership. App. at 2279-80.

"substantially all of its applicants for admission take the Law School Admission Test," and (2) is ABA-accredited or an AALS member. App. at 2552. MSL does not require the LSAT, never has applied for AALS membership, and is not ABA-accredited, so thus is not eligible for LSAC membership.

In addition to administering the LSAT, the LSAC performs a number of other services. The Candidate Referral Service ("CRS") provides lists of names and addresses of people who have taken the LSAT. Use of the CRS is open to any school which has degree granting authority from a state, regardless of LSAC membership or ABA accreditation, and MSL has made use of this service. App. at 2410-12, 2511-12, 2427-29. The Law School Data Assembly Service ("LSDAS") provides a summary of a law school applicant's college record and LSAT score. LSDAS is also open to all schools and has been used by MSL. App. at 2410-12. The LSAC publishes a handbook, *The Official Guide to U.S. Law Schools*, with a two-page description of each United States LSAC member school, and two appendices with the names and addresses of Canadian LSAC members and unaccredited United States law schools, including MSL, known to the LSAC. The LSAC also sponsors regional recruiting forums for law school applicants and conferences of pre-law advisors which are only open to LSAC members.

B. *The Complaint*

MSL applied for provisional ABA accreditation during the fall of 1992 and early 1993. MSL never claimed it was or would be in compliance with ABA standards, but instead asked for a waiver under Standard 802 which allows the

Council to grant variances from the standards. Following the established process, a seven-member site evaluation team appointed by and representing only the ABA visited MSL and then prepared a 76-page report which was sent to MSL. MSL sent a 90-page response to the site team report.

The Accreditation Committee, after reviewing the site report and the MSL materials, and hearing a presentation from six MSL representatives, recommended denial of MSL's accreditation application because it did not meet the ABA requirements. The Committee also recommended denial of the waiver request. In a letter to MSL explaining its denial recommendation, the Committee listed 11 areas where MSL failed to comply with ABA standards. App. at 837-48. These areas included the high student/faculty ratio, over reliance on part-time faculty, the heavy teaching load of full-time faculty, the lack of adequate sabbaticals for faculty, the use of a for-credit bar review class, the failure to limit the hours students may be employed, and the failure to use the LSAT or give evidence validating its own admission test.[2] App. at 845-46. The body of the letter discussed the inadequacy of MSL's law library, but the letter did not cite that inadequacy as one of the reasons for the denial recommendation. App. at 842-43; *see* app. at 845-46. The letter did not discuss the salaries of MSL's faculty. Invoking ABA procedures, MSL appealed but, after a full review at which MSL had the opportunity to make a presentation, the denial of accreditation was upheld on February 8, 1994.

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[2] MSL challenged all these standards, as well as standards on faculty salaries and law libraries, in its antitrust complaint.

MSL filed this action on November 23, 1993, alleging that the ABA, AALS, LSAC, and 22 individuals combined and conspired to organize and enforce a group boycott in violation of section 1 of the Sherman Act and conspired to monopolize legal education, law school accreditation, and the licensing of lawyers, in violation of section 2 of the Sherman Act. 15 U.S.C. §§ 1-2. The complaint basically alleged that the appellees conspired to enforce the ABA's anticompetitive accreditation standards by: (1) fixing the price of faculty salaries; (2) requiring reduced teaching hours and non-teaching duties; (3) requiring paid sabbaticals; (4) forcing the hiring of more professors in order to lower student/faculty ratios; (5) limiting the use of adjunct professors; (6) prohibiting the use of required or for-credit bar review courses; (7) forcing schools to limit the number of hours students could work; (8) prohibiting ABA-accredited schools from accepting credit transfers from unaccredited schools and from enrolling graduates of unaccredited schools in graduate programs; (9) requiring more expensive and elaborate physical and library facilities; and (10) requiring schools to use the LSAT.[3] MSL alleged that enforcement of these anticompetitive criteria led to the denial of its application for provisional accreditation and caused MSL to suffer a "loss of prestige" and direct economic damage in the form of declining enrollments[4] and tuition revenue.

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[3] MSL alleges that a self-interested cabal of legal educators who enforce the allegedly anti-competitive criteria to their own advantage has "captured" the ABA accreditation process.

[4] MSL says that its entering classes are now only 40% of what they were before the denial of accreditation. MSL br. at 4.

After MSL filed its complaint, the Antitrust Division of the United States Department of Justice ("DOJ") began an investigation of the ABA's accreditation process and on June 27, 1995, filed suit against the ABA in the United States District Court for the District of Columbia alleging violations of section 1 of the Sherman Act. The ABA entered into a consent decree with the DOJ on June 25, 1996, settling that case.

After a period of discovery under Rule of Reason standards, the district court granted the appellees summary judgment on both counts. The court held MSL did not suffer a cognizable antitrust injury; any disadvantage it incurred was attributable to the decision by the individual states to preclude graduates of unaccredited schools from taking bar examinations, and such injury "cannot be the basis for antitrust liability" under *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523 (1961). *Massachusetts School of Law v. American Bar Ass'n*, 937 F.Supp. 435, 441 (E.D. Pa. 1996). The court also held that to the extent that the unaccredited status creates a stigma which injures MSL, *Noerr* precludes recovery for the injury because it is "incidental to the primary, protected injury resulting from governmental decisions to preclude MSL graduates from taking certain bar examinations." *Id.* at 442. In the alternative, the court held that even if the stigmatic injury were not incidental to *Noerr*-protected conduct, the claim still would fail because the ABA has done nothing more than express its opinion, which is speech protected by the First Amendment, and not conduct for which there can be antitrust liability. *Id.* at 442-46.

MSL appeals from the order for summary judgment and a number of prior orders related to discovery, the dismissal of the individual appellees for lack of personal jurisdiction, the denial of a motion to recuse Judge Ditter, and the disqualification of MSL's inside counsel. The DOJ has filed an amicus brief arguing that the district court erred in holding that any stigmatic injury from non-accredited status was incidental to a *Noerr*-protected injury to the extent that there was no actual petitioning of government in this case. The DOJ also argues that the district court erred in holding that the First Amendment immunizes anticompetitive effects brought about through speech.

II. DISCUSSION

A. *Standard of Review*

We review a district court order granting summary judgment de novo both as to factual and legal questions. *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 632 (3d Cir. 1996); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1230 (3d Cir. 1993). We review discovery orders under an abuse of discretion standard. *Wisniewski v. Johns-Manville Corp.*, 812 F.2d 81, 90 (3d Cir. 1987); *Marroquin-Manriquez v. INS*, 699 F.2d 129, 134 (3d Cir. 1983). As germane here, MSL has to show that the district court's denial of discovery "made it impossible to obtain crucial evidence, and implicit in such a showing is proof that more diligent discovery was impossible." *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 818 (3d Cir. 1982) (citation omitted). We review the district court's denial of the motion for recusal for abuse of discretion. *Blanche Road Corp. v.*

Bensalem Township, 57 F.3d 253, 265 (3d Cir.), *cert. denied*, 116 S.Ct. 303 (1995); *United States v. Antar*, 53 F.3d 568, 573 (3d Cir. 1995).

B. *Discovery Issues*

1. Price Fixing

MSL argues that a district court order of May 20, 1994, which held that the ABA standards were not price fixing and *per se* unlawful and that discovery would proceed under a Rule of Reason analysis, *MSL*, 853 F.Supp. 837 (E.D. Pa. 1994), is contrary to law and should be reversed. MSL contends that the district court held in this order that "the ABA had *not* fixed prices," and that that holding is contrary to settled law. MSL br. at 40. This argument mischaracterizes the district court's holding. As the district court correctly noted, ABA Standard 405(a) (considering faculty salaries as part of school's ability to attract and retain quality faculty) is somewhat vague. Although not dispositive, the lack of a specific price floor or ceiling suggests that the standard represents something other than a classic price-fixing arrangement. *MSL*, 853 F.Supp. at 840. The court, however, did say that the standard was "price-affecting," which in many cases is sufficient for a *per se* approach. *Id. See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-24, 60 S.Ct. 811 (1940).

The court properly then went on to consider the context of the case. In this regard, it is significant that the ABA is a professional society and the Supreme Court has indicated that it has "been slow to condemn rules adopted by professional

societies as unreasonable *per se*," even when the behavior resembles conduct usually subject to a *per se* approach. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458, 106 S.Ct. 2009, 2018 (1986) (Rule of Reason approach even though behavior resembled group boycott); *see also National Soc'y of Prof. Eng. v. United States*, 435 U.S. 679, 692- 94, 98 S.Ct. 1355, 1365-66 (1978) (using Rule of Reason analysis even though agreement affected prices); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 n. 17, 95 S.Ct. 2004, 2013 n. 17 (1975) (distinguishing between practice of professions and other business activities); *United States v. Brown Univ.*, 5 F.3d 658, 672 (3d Cir. 1993) (Rule of Reason approach used even though behavior resembled price fixing).

MSL nevertheless argues that the price fixing aspect of the ABA standards has infected the entire conspiracy, justifying a *per se* approach, and that the Supreme Court has discouraged finding new exceptions to the *per se* standard. *See FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 428-31, 110 S.Ct. 768, 778-79 (1990). We, however, do not apply a new exception to the *per se* approach here. Rather, the use of the Rule of Reason is appropriate here because where "a conspiracy of this sort is alleged in the context of a profession, the nature and extent of [the] anticompetitive effect are too uncertain to be amenable to *per se* treatment." *Wilk v. American Medical Ass'n*, 719 F.2d 207, 221 (7th Cir. 1983).

MSL also appeals the district court's July 20, 1994 discovery order which held that MSL had not been injured by the alleged price fixing, and therefore denied discovery as to the faculty salary standard except insofar as it related to MSL's accreditation application. *MSL*, 857 F.Supp. 455 (E.D. Pa.

1994). Contrary to MSL's argument, this order did not hold as a final matter that the alleged salary fixing had no impact on MSL. It merely stated that "the evidence presently at hand does not support MSL's contention that one of the reasons the ABA declined to accredit MSL was noncompliance with the salary standard[ ]." *Id.* at 458. The court allowed MSL to continue discovery to ascertain whether salary was a factor in accreditation denial, but barred broader discovery as to the development and implementation of that standard.

MSL did find evidence that the ABA had data on its salaries (collected as part of general fact-finding about the school) and evidence that the ABA had warned other schools about low salaries. Nevertheless, MSL is not able to point to any evidence, or draw a reasonable inference, that the ABA actually used salary as a factor in denying MSL's accreditation or that the ABA's stated reasons for denying it accreditation were pretextual. In fact, the evidence and inferences point the other way, demonstrating that the ABA explicitly states low salaries as a factor when it is one. Thus, we cannot find that the district court's limitation of discovery in this manner was an abuse of discretion.

2. Conspiracy

MSL argues that the district court denied it the discovery necessary to prove its allegations of conspiracy. MSL complains generally about the lack of usefulness of the materials it did receive during discovery, but largely confines its argument to the materials the ABA turned over to the DOJ, some 544,000 pages. MSL cites a number of cases, including *Golden Quality Ice Cream Co. v. Deerfield Specialty Papers*,

Inc., 87 F.R.D. 53 (E.D. Pa. 1980), for the proposition that civil antitrust plaintiffs can obtain discovery of documents produced for government antitrust cases. Br. at 37. In these cases, however, the government case had begun before the civil case, and the civil plaintiffs sought copies of the material given to the government at the outset of discovery in their cases. *See Golden Quality*, 87 F.R.D. at 59.[5]

In the present case, the government's investigation began after MSL's, and MSL sought all of the documents given to the government after the court set the confines of discovery in MSL's case. Thus, the district court held in an order dated August 6, 1996, that a request for all documents given to the government was an attempt "to do an end run around" the existing discovery framework. The court found that MSL could have obtained all those documents which were relevant through the existing discovery framework. *See Board of Educ. of Evanston Township v. Admiral Heating and Ventilation, Inc.*, 513 F.Supp. 600, 603-04 (N.D. Ill. 1981) (denying complete turnover of all materials collected by grand jury investigation). Given the context of this case, the court did not abuse its discretion in this ruling.

MSL also argues that it was not given sufficient opportunity to conduct discovery to withstand the appellees' summary judgment motion. MSL cites several cases for the proposition

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[5] Further, these cases involved requests to stay the civil proceedings until the completion of the government investigation. *See, e.g., Golden Quality*, 87 F.R.D. at 55. Of course, we recognize that the government's case against the ABA was civil but we are using civil to mean a non-governmental case.

that granting summary judgment before the opposing party has had sufficient opportunity for discovery can be reversible error. *See, e.g., Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564, 568 (3d Cir. 1986); *Mannington Mills, Inc. v. Congoleum Indus., Inc.*, 610 F.2d 1059, 1073 (3d Cir. 1979). Br. at 4. These cases are in tension with another line of cases which encourages the use of summary judgment in order to avoid burdensome litigation expenses when the allegations are theoretical or speculative. *See, e.g., Pennsylvania ex. rel. Zimmerman v. Pepsico, Inc.*, 836 F.2d 173, 182 (3d Cir. 1988); *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n*, 745 F.2d 248, 262 (3d Cir. 1984). While the present case fits neither paradigm exactly, the district court, by allowing fairly extensive discovery and then closing discovery and entertaining the summary judgment motion, did not abuse its discretion.

C. *Summary Judgment*

MSL asserts three types of injury resulting from the ABA's allegedly anticompetitive conduct. The first is that MSL is at a competitive disadvantage in recruiting students because graduates of unaccredited schools cannot take the bar examination in most states. Second, MSL says that denial of accreditation creates a stigma, independent of the bar examination issue. Finally, MSL contends that the ABA's enforcement of its accreditation standards injures it directly by increasing the cost of faculty salaries and creating a boycott of unaccredited schools.

In granting summary judgment to the appellees, the district court held that they were not subject to antitrust liability for

MSL's principal alleged injury, a competitive disadvantage in recruiting students, to the extent that the decisions of the individual states to prohibit graduates of unaccredited schools from taking their bar examinations caused the injury. *MSL*, 937 F.Supp. at 441. The court based this holding on the principles of *Noerr*, 365 U.S. 127, 81 S.Ct. 523. MSL argues on appeal that the *Noerr* principles do not apply here because private anti-competitive conduct is immunized only where it is (1) clearly and affirmatively authorized by state policy, and (2) actively supervised by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943 (1980). *See also FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 112 S.Ct. 2169 (1992); *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658 (1988). The DOJ, in its amicus brief, does not challenge this aspect of the district court's holding.

In *Parker v. Brown* the Supreme Court held that the Sherman Act does not prohibit an anticompetitive restraint imposed by a state as an act of government. 317 U.S. 341, 352, 63 S.Ct. 307, 314 (1943). The decision in *Noerr* reaffirmed the *Parker* doctrine in stating "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." 365 U.S. at 136, 81 S.Ct. at 529. *Noerr* went on to hold that any attempt to petition or influence the government to impose an anticompetitive restraint is immune from antitrust action.[6] *Id.*

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[6] *Noerr* dealt specifically with legislative lobbying, but its principles were applied to cover attempts to influence the executive and judicial branches in *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct.

Further, even if the anticompetitive restraint results directly from private action, it is still immune if it is an "incidental effect" of a legitimate attempt to influence governmental action. *Id.* at 143-44, 81 S.Ct. at 533. As the Supreme Court put it, "*Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States' acts of governing, and the latter the citizens' participation in government." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 383, 111 S.Ct. 1344, 1355 (1991). Thus, the initial substantive issues on this appeal are whether state or private conduct caused the injury MSL alleges it suffered because its graduates could not take the bar examination in most states, and whether, if MSL suffered an injury as a result of the ABA's conduct, the injury was an incidental effect of the ABA's attempt to influence the states with respect to establishing criteria for bar admission. We will discuss each alleged injury separately.

1. Injury from bar examination requirements

Each state retains the authority to decide what applicants may take its bar examination and may be admitted to the bar.[7]

1585 (1965), and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609 (1972).

[7] *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 569, 104 S.Ct. 1989, 1996 (1984) ("Pursuant to the State Constitution the Arizona Supreme Court has plenary authority to determine admissions to the bar."); *In re Murphy*, 393 A.2d 369, 371 (1978) (bar admission "exercised [ ] exclusively by the Supreme Court"); *In re Hansen*, 275 N.W.2d 790, 796 (Minn. 1978) ("We have not delegated our authority to the ABA but,

Accordingly, MSL's argument that the ABA received "carte-blanche delegated authority to decide who can take bar exams," MSL reply br. at 19, is simply wrong. *See* cases cited *supra* note 7. Many, but not all, states consider the accreditation decisions of the ABA in their legal education requirement (one of many requirements) for taking the bar examination. Yet, every state retains the final authority to set all the bar admission rules, and individual applicants or law schools can petition the states for waivers or changes.

To the extent that MSL's alleged injury arises from the inability of its graduates to take the bar examination in most states, the injury is the result of state action and thus is immune from antitrust action under the doctrine of *Parker v. Brown*, 317 U.S. at 352, 63 S.Ct. at 314. The ABA does not decide who can take the bar examinations. Rather, it makes an accreditation decision which it conveys to the states, but the states make the decisions as to bar admissions. Without state action, the ABA's accreditation decisions would not affect state bar admissions requirements. Because the states are sovereign in imposing the bar admission requirements, the clear articulation and active supervision requirements urged by MSL are inapplicable. *See Quinn v. Kent Gen. Hosp., Inc.*, 617 F.Supp. 1226, 1240 (D. Del. 1985). In short, this case

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instead, have simply made a rational decision to follow the standards of educational excellence it has developed."); *Potter v. New Jersey Supreme Court*, 403 F.Supp. 1036, 1040 (D.N.J. 1975) (State's adoption of "the standards of an approving body does not support a conclusion that such adoption is an abrogation or delegation of the power or duty to supervise the practice of law in this State pursuant to the mandate of the State Constitution."), *aff'd*, 546 F.2d 418 (3d Cir. 1976).

does not involve a delegation of state authority. To the contrary, the states use the ABA to assist them in their decision-making processes. Thus, we have here a government action case.

Our holding is consistent with current antitrust jurisprudence. The Supreme Court held in a challenge to Arizona's bar admissions policies that the conduct in question "was in reality that of the Arizona Supreme Court," and thus immune under *Parker*. *Hoover v. Ronwin*, 466 U.S. 558, 573-74, 104 S.Ct. 1989, 1998 (1984). Further, the Supreme Court has held that when a state supreme court adopts a state bar rule banning legal advertising, and retains final enforcement authority over it, *Parker* immunity applies. *Bates v. State Bar of Arizona*, 433 U.S. 350, 361, 97 S.Ct. 2691, 2697 (1977) ("The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process."). This case is entirely analogous. The states do not adopt the ABA's accreditation processes, but they do adopt and give effect to the results.[8] Thus, the cases cited by MSL (*Midcal*, *Patrick*, and *Ticor*) are inapplicable because they dealt with situations where private parties were engaging in conduct, whether price-fixing (*Midcal* and *Ticor*) or denying hospital privileges (*Patrick*), which led directly to the alleged antitrust injury. Here, the

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[8] The Supreme Court opinion in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S.Ct. 1931 (1988), is also consistent with our holding because it specifically excluded from consideration any injury resulting from the adoption of the challenged standards by any government and dealt only with the independent marketplace effect of the defendant's conduct. *Id.* at 500, 108 S.Ct. at 1937.

state action setting the bar examination requirements led to the alleged injury.[9]

Our holding is also consistent with several court of appeals and district court decisions applying the principles of *Noerr*. In *Lawline v. American Bar Ass'n*, 956 F.2d 1378 (7th Cir. 1992), the Court of Appeals for the Seventh Circuit held under *Noerr* that the ABA could not be held liable for any antitrust injury resulting from the Illinois Supreme Court's adoption of ethical standards developed and promulgated by the ABA. *Id.* at 1383. Similarly, in *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 17 F.3d 295, 299 (9th Cir. 1994), the Court of Appeals for the Ninth Circuit held that a defendant which convinced a private association to produce a code that was adopted by or relied upon by a number of municipalities, and that injured the plaintiff, was immune from antitrust liability because the "injuries for which [plaintiff] seeks recovery flowed directly from government action."[10] *Id.* at 299. These cases cannot be distinguished effectively from this case.

In another analogous case, an organization that accredited chiropractic schools was held immune from Sherman Act liability for denying a school's accreditation because of a dispute over educational philosophy, when the alleged injury

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[9] In its reply brief, MSL continues to miss the crucial point that it is the direct action of the states which causes its injury and continues to discuss cases where private conduct caused the alleged antitrust injury. MSL reply br. at 11-15.

[10] In *Sessions*, the injury resulted from the denial of permits, while here the injury is from the prohibition precluding applicants from taking bar examinations in many states.

resulted from state decisions to deny licenses to graduates of unaccredited schools and from the effects of lobbying in favor of those state decisions. *Sherman College of Straight Chiropractic v. American Chiropractic Ass'n*, 654 F.Supp. 716, 722-23 (N.D. Ga.1986), *aff'd*, 813 F.2d 349 (11th Cir. 1987). *See also Zavaletta v. American Bar Ass'n*, 721 F.Supp. 96 (E.D. Va. 1989) (dismissing suit by students at unaccredited law school because of *Noerr* immunity). In these circumstances, MSL's claim that the ABA's conduct injured it because its graduates cannot take the bar examination in most states fails.

2. Stigma injury

MSL also alleges that independent of any bar examination requirements, it was injured by the stigmatic effect in the market place of the denial of accreditation. MSL claims that the ABA has conducted a campaign to convey the idea that ABA accreditation is the *sine qua non* of quality and that the ABA is the most, or only, competent organization to judge law schools. There is enough evidence to create a genuine dispute of material fact on this issue. *See* app. at 2105-09, 3570-72. Nevertheless, the district court ruled that this injury could not form the basis for antitrust liability because it was "incidental to the primary, protected injury," and thus immune under *Noerr*. *MSL*, 937 F.Supp. at 442. MSL challenges this holding on the grounds that there was no petitioning of government here, and therefore *Noerr* does not apply. The DOJ as amicus challenges the holding to the extent it finds petitioning unnecessary for immunity for stigma injury, but takes no position on whether any petitioning took place. We hold that there was sufficient petitioning to invoke *Noerr*

immunity.[11]

MSL relies extensively on the Supreme Court's decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S.Ct. 1931 (1988).[12] In *Allied Tube*, a producer of electrical conduit sought approval of its product from the National Fire Protection Association for inclusion of the product in the Association's National Electrical Code. A substantial number of state and local governments adopted the code virtually without change. To be included in the code, all that was required was a majority vote of the members present at the annual meeting of the Association. To prevent approval of the electrical conduit at question in the case, competitors of the producer stacked the annual meeting with persons who pledged to vote against approval. On the facts in *Allied Tube* the Court held that the code developed by the defendants had a force in the marketplace independent of any government adoption (or petitioning for such adoption) in that there was

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[11] In its reply brief, MSL seriously misstates the *Noerr* doctrine, arguing that only "successful petitioning of courts to clearly and affirmatively authorize ... closely supervise, review and approve" the ABA's conduct would provide immunity. MSL reply br. at 19. Under *Noerr*, any solicitation of government action is immune, whether or not it is successful. This mischaracterization stems from MSL's continued inability to recognize that there is state action at issue here, not private conduct.

[12] MSL's additional reliance on *American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 102 S.Ct. 1935 (1982), is misplaced because that case dealt with agency and apparent authority issues and does not consider *Parker* or *Noerr* immunity. It also dealt with an attempt to interfere directly with a company's customers, 456 U.S. at 562, 102 S.Ct. at 1940, an exception to *Noerr* inapplicable here.

a conspiracy among manufacturers, distributors, and consumers not to trade in products not approved by the code. 486 U.S. at 503, 507, 108 S.Ct. at 1938-40. Further, the Court held that the application of *Noerr* immunity depends "on the context and nature of the ... activity," and found the challenged conduct to be "the type of commercial activity that has traditionally had its validity determined by the antitrust laws." 486 U.S. at 504-05, 108 S.Ct. at 1939. That was so, the Court reasoned, because the activity of which the producer complained involved the dubious commercial practices of economically interested actors that had an impact on the political process; it was not political activity that had an impact on commerce.

The conduct of which MSL complains here is basically the ABA's justification of its accreditation decisions and MSL is asserting a loss of prestige resulting from it. This conduct is neither normal commercial activity nor the type of restraint of trade involved in *Allied Tube*, and thus that case is not controlling. A loss of prestige resulting from a refusal to approve a product or service does not alone make out an antitrust claim. *See Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989); *Consolidated Metal Prods., Inc. v. American Petroleum Inst.*, 846 F.2d 284, 293 (5th Cir. 1988).

Noerr immunity is proper in this case because the ABA engaged in petitioning activity, and the stigma injury which MSL suffered was incidental to that activity.[13] MSL admits

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[13] There is no "conspiracy" exception to either *Noerr* or *Parker* immunity. *Omni*, 499 U.S. at 383, 111 S.Ct. at 1355.

that in the past, "from the 1920's to approximately the mid 1970's," the ABA petitioned the states in a campaign to prohibit graduates from unaccredited schools from taking bar examinations. *See* MSL br. at 16. This campaign was obviously successful as now most states require graduation from an ABA-accredited school for admission to the bar. The ABA's current conduct surely would be considered petitioning if it took place during the past campaign. The fact that the ABA was successful in lobbying the states does not weaken its position. The ABA continues to communicate its accreditation decisions to the states, and it desires that they continue to give them credence. Discussing the quality and competence of its decisions is a legitimate, although somewhat indirect, way of petitioning the states to continue to follow its guidance. Yet, such activity is no more indirect than the public relations campaign held to be petitioning in *Noerr*. 365 U.S. at 140-41, 81 S.Ct. at 531.

There is an exception to *Noerr* immunity that would apply if the ABA "attempted directly to persuade anyone not to deal with" MSL. *See Noerr*, 365 U.S. at 142, 81 S.Ct. at 532. There is no evidence that the ABA made such an attempt (there was such evidence in *Allied Tube*), nor is there any other evidence suggesting that *Noerr* immunity should not apply here. In a supplemental filing of information after oral argument, MSL produced two instances where it claims the ABA directly mentioned MSL. The first is a *Boston Globe* article about the denial of accreditation to MSL in which an ABA governor defended the ABA standards as providing "a minimum level of quality and consumer protection assurance to the public." John H. Kennedy, "Andover Law School Loses Appeal for Accreditation," *Boston Globe*, February 9,

1994, at 42. The second proffered piece of evidence is a transcript of the ABA House of Delegates debate of MSL's accreditation application, where one member urged the denial of MSL's application and stated that the standards with which MSL did not comply "lie at the heart of a quality institution."

Both of these statements do nothing more than defend the ABA standards. As we discuss above, this is valid, if indirect, petitioning activity. The ABA is not saying directly that MSL is a bad institution, or that a particular student should not go there. MSL's attempts to characterize all the ABA's comments about the quality of its accreditation process as direct attacks on MSL does not make them direct attacks. We also point out that if a claim for stigma injury could be advanced in circumstances like those here, *Noerr* immunity would be confined severely; a petitioner for governmental action is likely to urge that the action is needed to ensure that standards are met, thereby suggesting that some entities do not meet appropriate standards.

3. Direct injury from ABA standards

MSL alleges a third injury which occurs directly from the ABA's enforcement of its standards, independent of both the bar examination and stigma issues. The challenged standards relate to faculty salaries (MSL charges price-fixing) and limitations on accredited schools accepting transfers or graduate students from unaccredited schools (MSL charges a boycott). Although the ABA is immune from liability attributable to the state action in requiring applicants for the bar examination to have graduated from an ABA-accredited law school and from any stigma injury resulting from the

denial of accreditation under the *Noerr* petitioning doctrine, the ABA is not immune in the actual enforcement of its standards. The state action relates to the use of the results of the accreditation process, not the process itself. The process is entirely private conduct which has not been approved or supervised explicitly by any state. *See Midcal*, 445 U.S. 97, 100 S.Ct. 937. Thus, the ABA's enforcement of an anticompetitive standard which injures MSL would not be immune from possible antitrust liability. Extending *Noerr* immunity to this type of private activity would run counter to *Allied Tube*.

We start our analysis of this direct injury issue by pointing out that "to survive [ ] motion for summary judgment, [the plaintiff] must establish that there is a genuine issue of material fact as to whether [the defendants] entered into an illegal conspiracy that caused [the plaintiff] to suffer a cognizable injury." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355 (1986). The district court held that MSL did not raise a genuine issue of fact as to whether it was injured by the salary, transfer or graduate student standards. *MSL*, 937 F.Supp. at 441 n.10, 445 n.20.

As we discuss above, MSL failed to show sufficient evidence that it was denied accreditation because it did not comply with the salary standard. Therefore, MSL has to show that the ABA's alleged fixing of salaries at its accredited schools somehow injured it in another way. At first glance, the argument that the ABA's faculty salary standards injured MSL makes no economic sense. As the district court commented, if ABA-accredited schools are required to pay

higher salaries, an unaccredited school should have a cost advantage. *See MSL*, 937 F.Supp. at 441 n.10. Indeed, it would appear that a conspiracy to increase the conspirators' costs would be no more logical than would a conspiracy to reduce the conspirators' income. *Cf. Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1195-1204 (3d Cir. 1995) (discussing predatory pricing monopoly case). Thus, while we consider this appeal on ordinary summary judgment standards, we point out that it could be argued that MSL "must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary." *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356.

MSL alleges that the faculty salary standards injured it in two ways. First, MSL asserts that it raised its salaries in an attempt to get accreditation. This claim is in direct conflict to its consistent assertion that it refused to comply with the ABA's anticompetitive standards and for that reason was denied accreditation. *See, e.g.*, MSL br. at 3-4. The claim also is remarkable because MSL made it clear that it would not comply with ABA standards to obtain certification. Further, MSL's assistant dean testified that MSL salaries have "never been tied to" ABA standards.[14] App. at 439. Rather, its dean stated that the salary increases were made out of fairness and as a reward for hard work. App. at 393. The only other related evidence shows that MSL acted independently to increase its salaries, and then later found that this action might help it get accreditation. *See* app. at 828.

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[14] MSL points out that the assistant dean has no role in setting MSL's salaries, so he is only giving his personal belief on the issue. MSL reply br. at 30, sup. app. at 5476-79.

Unsupported allegations to the contrary, *see* app. at 2123, are not sufficient without explanation to outweigh the prior testimony and avoid summary judgment. *See Hackman v. Valley Fair*, 932 F.2d 239, 241 (3d Cir. 1991); *Martin v. Merrell Dow Pharm., Inc.*, 851 F.2d 703, 706 (3d Cir. 1988); *but see Videon Chevrolet, Inc. v. General Motors Corp.*, 992 F.2d 482, 488 (3d Cir. 1993) (distinguishing *Martin* and holding that statements have to be clearly contradictory and without explanation to be insufficient to defeat summary judgment motion). There has not been sufficient explanation of the contradiction to create a genuine issue of material fact and justify reversing the summary judgment.

MSL's second contention that the ABA's salary standards injured it is that the standards inflated the market cost of law professors, thereby increasing the salaries MSL must pay its faculty. This market price argument is equally unavailing. MSL's stated policy was to rely on adjunct faculty. MSL did not produce evidence that any of its faculty other than its dean ever had been employed at another law school. In effect, MSL was hiring faculty from a different market, one unaffected by the ABA's conduct, or at least a different provider in the same market (teachers who never taught at ABA-accredited schools). The report by MSL's economic expert does not contradict this point, app. at 3568, because it contains only general and theoretical observations and is not tied to evidence in the record.[15] Thus, we can disregard it for

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[15] "[A]s I understand it, MSL was forced to raise its salaries to levels above what it would have otherwise (a) in an attempt to satisfy the standards and (b) because of the market effects of the standards on prices in the input markets. The anticompetitive effects of those practices affect

the purposes of reviewing the summary judgment. *See Pennsylvania Dental Ass'n v. Medical Serv. Ass'n*, 745 F.2d 248, 262 (3d Cir. 1984). Our result is supported by MSL's policy towards salaries: "because a professor at MSL must prove himself or herself as a full-time faculty member before obtaining a large salary, MSL retained a level of starting salaries that are below ABA requirements." App. at 2123.[16]

The situation here is analogous to that in *Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979). In that case we held that a purchaser from competitors of a price-fixer did not have standing to sue the price-fixer on the grounds that the general market price increased as a result of the price fixing. *Id.* at 587. We explained *Mid-West Paper* in *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1167-68 (3d Cir. 1993), where we focused on how direct an impact the challenged conduct had on the plaintiff. MSL was not impacted directly by the ABA's criteria because it was hiring a different kind of professor. *Mid-West Paper*

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input prices (salaries, etc.) for MSL, as well for every other law school. The practices injure all of the schools that have accepted the standards, as well as those that have not. Because the standards have an undeniable impact on input costs, every school is forced to incur higher costs, along with the reduction in the flexibility needed to respond efficiently to changing conditions, all schools suffer competitive injury as well." App. at 3568.

[16] It is interesting to note that MSL charges that the ABA and the AALS engaged in a conspiracy to restrain trade. It thus appears that insofar as the salary standards are concerned, MSL believes that the AALS conspired to increase its member law schools' costs.

thus controls, and summary judgment was proper.[17]

MSL also alleges a boycott in that the ABA prevented its accredited schools from accepting transfers or graduate students from unaccredited schools. The district court held that MSL had not produced any evidence that it was injured by either of these rules. *MSL*, 937 F.Supp. at 445 n.20. This holding is correct. MSL has done nothing more than state the standards and allege that they injured MSL. *See* app. at 2108, 2120. There is no factual support for these allegations. Further, the evidence shows that MSL actively opposed its students transferring, both in policy and practice.[18] MSL therefore cannot claim that the ABA's prohibition on transfers with credit injured it.[19]

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[17] This is true even though *Mid-West Paper* dealt with standing and we deal here with whether there is a genuine issue of fact as to MSL's injury, for the concepts are similar.

[18] Its dean testified in another proceeding "MSL would have [ ] denied admission had it known [a student] intended to seek transfer away as soon as possible." App. at 1415. MSL considered transfers to be "extremely harmful to the school," *Id.* at 1416, and that assisting students in transferring was "self-destructive." *Id.* at 1231.

[19] MSL's reliance on the allegations in the government's antitrust case which we described above is unavailing for two reasons. First, those allegations never were proven because the case was settled, and therefore cannot be taken as true in this case. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1460-61 (D.C. Cir. 1995); *Petruzzi's IGA v. Darling-Delaware*, 998 F.2d at 1247. Second, the government never alleged that MSL suffered any injury from these standards and does not so argue in its amicus brief in this case. *See, e.g.*, DOJ br. at 6-7.

MSL also alleges that the AALS boycotted MSL by refusing membership and that the LSAC boycotted MSL by refusing to allow it to attend certain recruiting conferences. *See* MSL br. at 59. The allegations regarding the AALS are simply incorrect. AALS membership is independent of ABA accreditation, and MSL never has applied for such membership. App. at 2278-80. Even though it is not a member, MSL can attend AALS conferences and has done so. *Id.* at 2280. Therefore MSL has not suffered any injury at the hands of the AALS.

The LSAC's failure to invite MSL to its conferences does not constitute a boycott.[20] Under the fact-pattern here to demonstrate a boycott MSL, has to show that these conferences are an essential facility for recruiting students as there is no other potential basis for the boycott claim. Such an essential facility or claim fails whenever a plaintiff (1) cannot show that the defendant has a monopoly over the alleged essential facility; (2) the facility cannot be duplicated in a reasonable manner; and (3) the plaintiff has been denied its use. *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996). MSL has shown only that the LSAC denies it participation. There is no evidence suggesting that the LSAC has a monopoly over access to law students or pre-law advisors, or even over recruiting fairs. The LSAC does not hinder MSL's recruiting in any way, it just does not aid it

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[20] LSAC conferences are only open to LSAC member schools. MSL is not a member of the LSAC because it does not use the LSAT and it is not accredited by either the ABA or the AALS.

by allowing MSL to attend its conferences.[21] Such activity is not required by the antitrust laws, and its absence does not constitute antitrust injury.

Further, MSL has not shown that the LSAC injured it. The LSAC never allowed MSL to attend its conferences and, prior to ABA accreditation denial, MSL's enrollment exceeded its projections. App. at 2420-24. It was the denial of accreditation which caused MSL's enrollment to decline, and as discussed above, in light of *Parker* and *Noerr* that loss cannot be the basis for antitrust liability. MSL contends that as long as it was injured in some way by the overall alleged conspiracy, it need not show injury from its individual aspects, and cites in this respect *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d at 1172. Reply br. at 35. While this principle is correct, it is inapplicable here. *In re Lower Lake Erie* did not involve state action or petitioning of government immunity issues. Here, MSL must show that it was injured in some way by the ABA's enforcement of its standards, independent of any injury from the immune state action or petitioning, and as we discuss above, it has not done so.

Inasmuch as we hold that MSL has failed to demonstrate an injury for which antitrust liability may lie, we need go no further to affirm the district court's summary judgment order with respect to issues beyond those controlled by *Parker* and *Noerr*. Thus, we do not consider the district court's alternative free speech immunity theory. Further, we make no

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[21] Similarly, MSL's claims about getting only a listing in *The Official Guide to U.S. Law Schools* fail because there are many such publications, some of which do describe MSL.

comment on whether MSL produced sufficient evidence to show the existence of a conspiracy for two reasons.[22] First, the alleged conspiracy with respect to the injuries from the bar examination requirements and the stigma from denial of accreditation involved immunized conduct. *See Omni*, 499 U.S. at 381-84, 111 S.Ct. at 1354-56. Second, MSL did not demonstrate that it suffered injury from the conduct not immunized. 15 U.S.C. § 15; *see Matsushita*, 475 U.S. at 585-86, 106 S.Ct. at 1355; *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d at 641; *see also Sciambra v. Graham News*, 892 F.2d 411, 414-15 (5th Cir. 1990); *United States Football League v. National Football League*, 842 F.2d 1335, 1377-78 (2d Cir. 1988). Of course, we hasten to add that we do not hold that if MSL had been able to demonstrate injury from conduct beyond the scope of *Parker* and *Noerr* antitrust immunity there necessarily would be liability as we have no need to reach that point.

D. *Dismissal of the Individual Appellees*

The district court dismissed claims against the 22 individual appellees for lack of personal jurisdiction in the Eastern District of Pennsylvania in an order on March 11, 1994. *MSL*, 846 F.Supp. 374 (E.D. Pa. 1994). The court, upon reconsideration and after MSL had conducted some discovery, found on May 31, 1994, that MSL could not "suggest, much less show, substantial acts in Pennsylvania." *MSL*, 853 F.Supp. 843, 845 (E.D. Pa. 1994). MSL challenges the dismissal on the grounds that it was entered before MSL was allowed to

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[22] We do note, however, that there is no probative evidence that the AALS or LSAC was involved in any kind of conspiracy with the ABA.

undertake any discovery as to the appellees' contacts within the district.

Our rule is generally that jurisdictional discovery should be allowed unless the plaintiff's claim is "clearly frivolous." *Nehemiah v. The Athletics Congress*, 765 F.2d 42, 48 (3d Cir. 1985), *citing Compagnie des Bauxites de Guinee v. L'Union Atlantique S.A. D'Assurances*, 723 F.2d 357, 362 (3d Cir. 1983). The district court found (at least by implication), and we agree, that MSL's jurisdictional claims were clearly frivolous. Our result is in accord with other cases which hold that a mere unsupported allegation that the defendant "transacts business" in an area is "clearly frivolous." *See Garshman v. Universal Resources Holding, Inc.*, 641 F.Supp. 1359, 1366 (D.N.J. 1986), *aff'd on other grounds*, 824 F.2d 223 (3d Cir. 1987);[23] *see also American Centennial Ins. Co. v. Handal*, 901 F.Supp. 892, 899 (D.N.J. 1995). MSL legitimately cannot allege a nationwide conspiracy and then say, without more evidence, that such a conspiracy must have effects in Pennsylvania.

Further, jurisdictional discovery generally relates to corporate defendants and the question of whether they are "doing business" in the state. *See Compagnie Des Bauxites*, 723 F.2d at 362 and cases cited therein. Where the defendant is an individual, the presumption in favor of discovery is reduced. *See Shaw v. Boyd*, 658 F.Supp. 89, 91 n.1 (E.D. Pa. 1987). Thus, the district court's order dismissing the individual appellees without ordering discovery first was

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[23] *Garshman* was decided on venue grounds, but the analysis is the same as for personal jurisdiction. *Garshman*, 641 F.Supp. at 1366.

correct.[24]

E. *Recusal of Judge Ditter*

MSL made several attempts to have Judge Ditter recused. Judge Ditter denied MSL's recusal motion in an opinion dated December 16, 1994. *Massachusetts School of Law v. American Bar Ass'n*, 872 F.Supp. 1346 (E.D. Pa. 1994). MSL's attempts to seek his recusal in this court were also unavailing (one denied, one held moot in light of this appeal). Inasmuch as we are affirming the summary judgment, we need not consider arguments regarding reassignment on remand. We review the denial of the recusal motion for abuse of discretion.

MSL argues that Judge Ditter has both the appearance of bias and actual bias, and should be removed from the case under either 28 U.S.C. § 455(a) or this court's authority as recognized in *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 167 (3d Cir. 1993), and *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 98 (3d Cir. 1992). The standard for recusal is whether an objective observer reasonably might question the judge's impartiality. MSL contends that both one past out-of-court experience, and the bias which it asserts is apparent from his rulings, justify Judge Ditter's recusal.

MSL argues that Judge Ditter's participation in 1974-75 on an outside committee which tried to help the Delaware Law School, where his son was then a student, obtain ABA

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[24] We note that in view of our merits disposition we can conceive of no way that the individual appellees could be liable in this case.

accreditation justifies recusal. In over 200 pages of documents submitted by MSL relating to Delaware Law School (gleaned from depositions and testimony before several courts), Judge Ditter's name appears only six times. This evidence suggests nothing more than that Judge Ditter had several meetings with the person who was the driving force behind the effort to make changes at Delaware Law School in order to qualify for accreditation. There is one affidavit from the former dean of that school that suggests that Judge Ditter played a more active role, but Judge Ditter, in his careful consideration of the recusal motion, sufficiently points out the inconsistencies between this declaration and other more contemporaneous testimony. *See MSL*, 872 F.Supp. 1346, 1358-65 (E.D. Pa. 1994). We thus affirm Judge Ditter's holding that nothing related to Delaware Law School creates an appearance of bias in this case. This is true both because of Judge Ditter's limited role at the time and the amount of time which has passed. This view is in accord with the prevailing case law. *See, e.g., In re Allied Signal, Inc.*, 891 F.2d 974, 976 (1st Cir. 1989) (upholding denial of recusal motion based on social and business relationship eight years earlier between judge and one of plaintiff's attorneys); *Alexander v. Chicago Park Dist.*, 773 F.2d 850, 857 (7th Cir. 1985) (denying recusal motion based on judge's representation of witness 25 years earlier).

Furthermore, we do not understand why Judge Ditter's participation in the Delaware Law School accreditation process, no matter how intensive, would cause an objective observer to believe that he would not be impartial here. The Delaware Law School and MSL situations, though somewhat similar in nature, are unrelated. Indeed, it is difficult even to

articulate a reasonable basis on which to argue that by reason of Judge Ditter's experiences regarding the Delaware Law School he would have a bias here. As far as we can see, there is no more basis to think that Judge Ditter was not impartial here because of his experiences 20 years ago with Delaware Law School, than to believe that a judge who had been in an automobile accident would not be impartial in a case involving a different accident.

MSL also argues that Judge Ditter's rulings, both in substance (allegedly always against MSL) and in form (allegedly repeatedly vilifying and condemning MSL and its dean), demonstrate actual bias. Since we have affirmed several of the rulings MSL contends demonstrate bias, and a review of the record shows that there was no pattern of consistently ruling against MSL, there is no actual bias.

We also point out that a judge's consistent pattern of ruling against a party could be entirely justified for that party might consistently be taking positions that cannot be supported. Even-handed justice does not require a judge to balance numerically the rulings in favor of and against each party. After all, each ruling stands on its own. Furthermore, the Supreme Court has said that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157 (1994).[25] We do not believe that a reasonable person who looked at Judge Ditter's rulings objectively would find the appearance of bias. *See United States v. Bertoli*, 40 F.3d

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[25] The holding in *Liteky* required bias to stem from an "extrajudicial source" to support a recusal under section 455(a).

1384, 1413 (3d Cir. 1994). It should be apparent to anyone that he worked diligently in this hard-fought case and, as far as we are concerned, reached the correct outcome.

We also do not find that any of Judge Ditter's comments cited by MSL, *see* MSL br. at 23-25, suggest the appearance of partiality. The *Liteky* Court held that "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." 510 U.S. at 555, 114 S.Ct. at 1157, *see also In re Skobinsky*, 167 B.R. 45, 52 (E.D. Pa. 1994). MSL's desire to impute hostile intent to Judge Ditter does not mean he had that intent, and does not create an appearance of bias. MSL's attitude appears to be that anyone who disagrees with it is both wrong and biased, but the evidence does not show this. The cases cited by MSL are inapplicable because they dealt with unique extrajudicial contact with a party, *In re Sch. Asbestos Litig.*, 977 F.2d 764 (3d Cir. 1992), an implicit admission of bias by the judge, *In re Antar*, 71 F.3d 97, 101 (3d Cir. 1995), or reassignment on remand, *Haines* and *Alexander*. Since this case will not be remanded, we need not consider reassignment and, as we discussed, Judge Ditter's denial of the recusal motion was not an abuse of discretion.

F. *Disqualification of Inside Counsel*

MSL also appeals the district court's disqualification of five members of MSL's administration and faculty from serving as

trial counsel, giving oral argument, and taking depositions.[26] Since MSL does not allege that it received incompetent counsel, and we are affirming the summary judgment order, the issue probably is moot. In any event, the court did not err in requiring the disqualification.

III. CONCLUSION

The order of the district court entered August 29, 1996, granting the appellees summary judgment and the other orders on appeal will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
For the Third Circuit

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[26] By agreement among the parties, this order later was modified to allow two of the MSL professors to act as trial counsel. MSL br. at 29 n. 12.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, INC.

v.

AMERICAN BAR ASSOCIATION, et al.

Civil Action No. 93-6206.

Aug. 29, 1996.

OPINION AND ORDER

DITTER, *District Judge.*

I. INTRODUCTION

For many years, the American Bar Association has evaluated law schools using a set of standards it has developed for that purpose. The Massachusetts School of Law brought this antitrust action against the American Bar Association, the Law School Admission Council, Law School Admission Services,[27] and the Association of American Law Schools[28] after ABA

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[27] The LSAC and LSAS work together under the name LSAC/LSAS. In part, they sponsor, administer, and profit from the Law School Admission Test.

[28] The AALS is an association of law schools. Its membership includes many ABA-accreditated law schools and it participates in the ABA accreditation process.

denied it provisional accreditation. MSL alleges that the defendants violated the Sherman Act by restraining trade with anticompetitive policies[29] and conspiring to monopolize, and monopolizing the law school training field, the accreditation of law schools, and the licensing of lawyers.[30] It seeks treble damages, interest, and costs. It does not seek accreditation as part of this lawsuit.

MSL maintains that *some* of the standards that ABA uses to inform its accreditation decisions violate the Sherman Act. Plaintiff's restraint of trade claim rests on its contention that the ABA's adoption and approval of the standards have the purpose and effect of artificially enhancing faculty salaries, limiting the services of law school professors, imposing unnecessarily costly guidelines for law school libraries,

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[29] Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal.

15 U.S.C. § 1.

[30] Section 2 of the Sherman Act provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor.

15 U.S.C. § 2

increasing law school tuitions, and "freezing out of law school persons from lower socio-economic classes and persons in mid-life." Plaintiff's monopolization claim is based on its contention that the defendants have worked in concert, using some of the ABA's standards, to monopolize the law school training, accreditation, and licensing processes.

Before me is ABA's motion for summary judgment.[31] It contends that judgement should be entered in its favor for six independent reasons: (1) MSL's alleged injury stems exclusively from the bar admissions rules of the sovereign states, not the ABA standards; (2) MSL cannot demonstrate an injury to competition between or among law schools generally resulting from the ABA's decision not to accredit MSL; (3) MSL cannot demonstrate that the ABA standards that it is challenging were the cause-in-fact of its injuries; (4) the antitrust laws do not apply to the non-commercial aspects of higher education; (5) even examining the particular challenged standards under a rule of reason analysis, no triable issue exists and judgment is proper as a matter of law; and (6) the conspiracy alleged by plaintiff is illogical and makes no economic sense. For the reasons discussed below, I will grant ABA's motion.

II. STATEMENT OF FACTS

MSL is a Massachusetts corporation that has been operating a law school in Andover, Massachusetts, since 1988. In 1990, MSL was authorized by the board of regents

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[31] In addition to filing separate motions for summary judgment, LSAC/LSAS and AALS have joined ABA's motion.

of the Commonwealth of Massachusetts to award the degree of *juris doctor* to its graduates. That authority enables plaintiff's graduates to sit for several bar examinations, including Massachusetts'.

In the fall of 1992, MSL applied for ABA accreditation. Accreditation is a valuable credential for a law school because all 50 states and the District of Columbia permit graduates of ABA-accredited schools to sit for their bar examinations. The prerequisites for taking particular bar examinations and ultimate admission to the bar are established by the states, not the ABA or any of the other defendants. MSL has its own approach to legal education, an approach that often differs sharply from ABA's more traditional views. Although it acknowledged that as a matter of policy, many aspects of its program did not comply with the ABA standards that guide accreditation decisions, MSL requested a variance for each of the standards which it had refused to follow.[32]

Following its usual procedure when making accreditation decisions, ABA sent a site evaluation team to examine MSL's program. Based on that team's factual report about MSL and MSL's response, ABA denied MSL provisional accreditation. A series of appeals taken by MSL were fruitless.

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[32] ABA standard 802 provides that:

> A law school proposing to offer a program of legal education contrary to the terms of the Standards may apply to the Council for a variance. The variance may be granted if the Council finds that proposal is consistent with the general purposes of the Standards. The Council may impose such conditions or qualifications as it deems appropriate.

MSL maintains that its failure to secure ABA accreditation handicaps the school in competing for students because its graduates cannot take the bar examinations of 42 states, and the school has been generally stigmatized by the denial. (Compl. ¶¶ 18, 41; Velvel Dep., 8/25/94, at 30:1-15).

In summary, this case concerns the evaluation of educational philosophies, methods, and facilities. ABA's refusal to approve that of which it disapproves and MSL's demand to differ but be accepted as though it conformed--or as though its differences did not matter--are the bases for this suit.

III. DISCUSSION

A number of courts have considered issues similar to those raised in MSL's complaint. Application of these decisions to the case at bar lead me to conclude that judgment should be entered against MSL.[33]

A. *MSL's Alleged Injury Results from Governmental Action not Private Conduct*

ABA argues that MSL's alleged injury results from the independent decision of the sovereign states to preclude

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[33] As discussed more thoroughly below, no genuine issue of material fact exists. In this regard, it should be noted that although MSL continues to seek further discovery, thus far in this litigation, there have been 44 depositions taken, many of them over multiple days, in 14 states and two countries. Moreover, more than 100,000 pages of documents have already been produced.

graduates of unaccreditated law schools from taking their bar examinations. ABA's position is based on the Supreme Court's seminal decision in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). *Noerr* involved an antitrust claim brought by long distance trucking companies against, *inter alia*, an association of railroads. The plaintiffs alleged that the defendants violated sections 1 and 2 of the Sherman Act by conspiring to restrain trade in, and monopolizing the long distance freight business. *Id.* at 129. The plaintiffs claimed that the defendants had engaged in a propaganda campaign "to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business." *Id.* The Supreme Court held that "where a restraint upon trade and monopolization is the result of a valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." *Id.* at 136. The Court reasoned that when an antitrust-plaintiff's injury is proximately caused by the government, the government's action constitutes a supervening cause that breaks the chain of causation between an antitrust-defendant's action and any anticompetitive effect. Areeda & Hovenkamp, *Antitrust Law* ¶ 201 at 14 (1994 Supp.).

To decide whether the *Noerr* principles apply, a court should ask: (1) what is the harm that the plaintiff alleges it suffered?, and, (2) is that harm the proximate result of governmental action or private conduct? If the harm results from governmental action, no antitrust liability will lie. Moreover, if the plaintiff alleges two harms, one the proximate result of private conduct and the other the result of governmental action, no liability will attach to the private conduct if the harm associated with that conduct is merely incidental to the

harm associated with the governmental action. *Id.* at 143

Courts have had several opportunities to flush out the extent of *Noerr* immunity in various contexts. In *Lawline v. American Bar Ass'n*, 956 F.2d 1378 (7th Cir.1992), *cert. denied*, 114 S.Ct. 551 (1993), the plaintiffs sued the ABA and several other bar associations. They challenged as anticompetitive certain ethical rules adopted by the Illinois Supreme Court and the Northern District of Illinois at ABA's recommendation. The plaintiffs also challenged as anticompetitive certain ethical opinions promulgated by the defendant bar associations. They alleged that the rules and ethical opinions injured them by restricting their ability to advertise and to form partnerships with non-lawyers. *Id.* at 1382.

The Seventh Circuit upheld the district court's dismissal of the plaintiffs' antitrust claim. *Id.* at 1383. Relying heavily on the Supreme Court's decision in *Noerr*, the court found that when a trade association provides information but does not constrain others to follow its recommendations, it does not violate the antitrust laws. *Lawline*, 956 F.2d at 1383 (citing *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir.1989)). The basis for this finding is readily apparent--when a state adopts as its own the conclusions reached by a professional association (in that case the ethical rules and opinions and in this case conclusions about the quality of law school educations), it is the state and not the private party that injures the plaintiff with anticompetitive conduct. *Id.* at 1384. As the Sherman Act does not proscribe states from engaging in anticompetitive conduct, *see Noerr*, no antitrust claim will lie against trade

associations under these circumstances.[34]

In *Sessions Tank Liners, Inc., v. Joor Mfg., Inc.*, 17 F.3d 295 (9th Cir.), *cert. denied*, 115 S.Ct. 66 (1994), the Ninth Circuit rejected an antitrust claim brought against a corporation that had caused a prominent standard-setting organization to amend its influential fire code to the disadvantage of the plaintiff. Local governments either formally adopted the organization's standards, or, in some cities and towns where the standards had not formally been adopted, local officials refused to issue permits for structures that did not conform with the standards. *Id.* at 296. The plaintiff alleged that the standards injured its ability to compete for customers. In rejecting the antitrust claim, the court found that the plaintiff's injuries resulted from governmental action, not the defendant's conduct. *Id.* at 296. *Noerr* principles therefore applied to shield the defendant's conduct from potential antitrust liability.

* * *

Plaintiff attempts to distinguish *Noerr*, *Lawline*, and *Sessions*. It argues that the instant case is different from those cases because here, the defendants (not the government) have inflicted the alleged injury. To determine the cause of plaintiff's alleged injury, a brief exploration of that injury is first necessary.

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[34] *See also Sanjuan v. American Bd. of Psychiatry and Neurology*, 40 F.3d 247 (7th Cir. 1994) (Easterbrook, J.) (rejecting an antitrust claim brought against a trade association that declined to "certify" the plaintiff-doctors).

MSL contends that its failure to be accreditated has caused it competitive harm by impairing its ability to solicit prospective students. (Compl. ¶ 41) The lack of accreditation limits its ability to solicit prospective students because many states preclude graduates of non-accreditated schools from taking their bar examinations[35] and non-accreditated schools bear a stigma.[36] (Pl.'s Resp. to Mot. for Summ. J. at 28 n.12,

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[35] An excerpt from Mr. Velvel's deposition aptly states the school's position:

> Question: And it is your belief that the reason that the students are less interested in the school today is because they cannot be admitted to the bar in states other than Massachusetts?
>
> Answer: I am certain of it to a moral certainty, Mr. Pritikin. I think there is no legitimate doubt about it. I don't think that all the fancy lawyers and economists in the world would ever be able to remotely prove the contrary 'cause the contrary is not true.

(Velvel Dep., 8/25/95, at 30:1-15; Velvel Aff., 3/22/95, at ¶ 23(a), Compl. ¶18)

[36] MSL also contends that it has suffered two additional injuries--in an effort to treat its hardworking faculty fairly, to maintain faculty morale, and to "have any chance of accreditation," MSL raised the salaries of its professors and bought more books for its library. (Velvel Aff., 3/22/95, ¶ 41(a); Pl.'s Surreply Br. in Further Opp'n to ABA's Mot. for Summ. J., at 3-5). MSL admits that, notwithstanding the increase, its starting salaries lag behind those at ABA accreditated schools. Despite this fact, MSL has consistently maintained that it has a highly skilled and "hardworking" faculty. (Complaint ¶ 12; Velvel Aff., 3/22/95, ¶ 41(b)). Therefore, although it contends that ABA's standards have artificially inflated faculty salaries, MSL admits that it has been able to avoid some of these high costs without sacrificing quality. Thus, rather than injuring

Compl. ¶ 41). It maintains that both these factors cause it to lose students who would otherwise attend the school.

Any competitive disadvantage that MSL suffers because some sovereign states preclude graduates of non-accreditated law schools from taking their bar examinations cannot be the basis for antitrust liability. This is what *Noerr*, *Sessions*, and *Lawline* say. The states decide who can sit for their bar examinations. I permitted MSL to explore this issue extensively and it has offered no evidence to show that ABA or the other defendants suggest, recommend, or decide who can sit for bar examinations or be admitted to practice in any state. When the impact of these independent governmental decisions is viewed within the context and nature of ABA's activity, it becomes clear that any injury that flows from state rules governing bar admission squarely falls within the prescripts of *Noerr*. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 594 (1988).[37]

MSL. ABA's standards have provided it with a competitive advantage--it can spend less on faculty than ABA schools and still purchase quality teaching services. Moreover, as these additional "injuries" result from MSL's unilateral decisions, I find that they are not an appropriate basis for potential ABA antitrust liability.

[37] MSL also contends that the cases like *Noerr* are inapposite because they involved situations where the plaintiff's injury resulted from governmental adoption of allegedly anticompetitive doctrines, while in the instant case the state governments have merely relied upon ABA's accreditation decisions and not officially adopted the ABA's standards. This argument also misses the mark. In *Sessions Tank Liners*, although many local governments formally adopted the challenged standards into law, in some cities and towns, the standards were enforced not through explicit codification, but rather by having local officials refuse to issue

Moreover, any competitive disadvantage that MSL suffers because it "is stigmatized in jurisdictions in which graduation from an ABA-accreditated law school is not a prerequisite for sitting for the bar examination," also comes within the *Noerr* doctrine (Pl.'s Response to Mot. for Summ. J. at 28 n. 12 (emphasis added); Compl. ¶ 41). Plaintiff alleges that in addition to the injury inflicted by the governmental restrictions, MSL suffers injury purely because of the denial of accreditation. MSL's argument here is no doubt presented in an effort to identify some independent ABA-inflicted injury thus putting this case outside of *Noerr 's* reach. While such an injury, on its face, might appear to be independent from the injury that flows from the governmental restrictions on bar admittance, the Supreme Court rejected a similar argument in *Noerr*, holding:

> the District Court found that the purpose of the railroads was to destroy the goodwill of the truckers, among the public generally and among the truckers' customers particularly, in the hope that by doing so the over-all competitive position of the truckers would be

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permits for structures or activities that were inconsistent with the code. 17 F.3d at 296. In these cities and towns, the governments accepted the conclusions that the standards produced without explicitly adopting the standards themselves. *See* Areeda & Hovenkamp, *Antitrust Law*, ¶ 204 at 75-76 (1994 Supp.). This is identical to the instant case, where government has accepted the conclusions that ABA's standards produce without explicitly adopting the standards themselves. The alleged injury in both circumstances, however, is the same: graduates are precluded from being admitted to the practice of law in certain jurisdictions. As discussed, this injury results from a governmental, not private, decision and cannot therefore give rise to antitrust liability.

> weakened, and the railroads were successful in these efforts to the extent that such injury was actually inflicted. The apparent effect of these findings is to take this case out of the category of those that involve restraints through governmental action and thus render inapplicable [our finding that no antitrust claim will lie where governmental action is the proximate cause of the plaintiff's injury]. But this effect is only apparent and cannot stand under close scrutiny. There are no specific findings that the railroads attempted *directly to persuade* anyone not to deal with the truckers.

Noerr, 365 U.S. at 142 (emphasis added).

The Court concluded that absent evidence suggesting that the railroads attempted *directly to persuade* anyone not to deal with the truckers, the loss of customer good will that the truckers suffered was merely *incidental* to the primary protected injury. In other words, if the railroads actively tried to convince people not to hire the truckers, and if as a result customers did not hire the truckers, the railroads' actions would not be protected under *Noerr* -- the railroads' actions would cause an injury independent of the protected injury inflicted by the government. If, on the other hand, the railroads put negative information about the truckers into the marketplace in an effort to influence government action, and if as a result of that information customers chose not to use the truckers, the railroads' actions would be protected as incidental to the protected injury inflicted by the governmental action -- the governmental action would brake the chain of causation between the railroads' actions and the truckers' harm.

Just as there was no finding in *Noerr* that the railroads attempted *directly to persuade* anyone not to deal with the truckers, I find that no factfinder could reasonably conclude that ABA has attempted *directly to persuade* prospective students not to attend MSL. Here, as in *Noerr*, even assuming that MSL's failure to become accreditated resulted in "loss of prestige" or some abstract "stigma,"[38] that injury is incidental to the primary, protected injury resulting from governmental decisions to preclude MSL graduates from taking certain bar examinations.[39]

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[38] I note that any stigma that MSL suffered as a result of ABA denying accreditation must be viewed in context. Since authorizing MSL to grant degrees, the administrative council in charge of educational standards in Massachusetts has repeatedly expressed concern over many aspects of MSL's educational program. In fact, in January of 1994, the council threatened to revoke MSL's degree-granting authority unless MSL could demonstrate that its admissions standards were reliable. (Ex. D in Supp. of ABA's Mot. for Summ. J., p. 2; Fallon Dep. at 54:6). The council was concerned that MSL was matriculating unqualified students so as to finance its more qualified ones. The council also expressed concern over the unprecedented number of formal written student complaints filed against MSL. (Fallon Dep. at 15:20-17).

[39] This conclusion is strengthened by the Ninth Circuit's language in Sessions. Discussing *Noerr*, the Ninth Circuit wrote that:

> The *Noerr* Court also rejected the proposition that petitioning immunity was limited to injuries flowing directly from governmental action. It held that the railroads were also shielded from liability for the harm the truckers suffered in their relationships with their customers. In the Court's view, that injury was "incidental" to the defendant's campaign to influence legislation.

Sessions, 17 F.3d at 299; *see also Allied Tube*, 486 U.S. at 499.

Plaintiff maintains that its ability to compete for students is impaired by the denial of accreditation because: (1) its graduates cannot sit for many bar examinations; and, (2) it has been stigmatized. The former injury is clearly inflicted as a result of state action. Moreover, the latter injury is incidental to the primary protected injury. Therefore, MSL's claims are barred under *Noerr*.

B. *In Denying Accreditation, ABA Merely Expressed its Opinion which is Protected Under the First Amendment*

Although I conclude that MSL's claims are barred by *Noerr* immunity, even assuming that the stigma injury is not incidental to the primary protected injury, MSL's claims still fail.[40] ABA contends that in refusing to accredit MSL, it

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[40] MSL has presented some evidence which might be construed to mean that ABA has attempted directly to persuade potential students to attend accreditated schools. For example, Mr. Velvel has testified that:

> The ABA accreditors thus possess a monopoly not only because in most states it is necessary to graduate from an ABA school in order to take the bar examination and practice law, but also because *by continuous efforts they have persuaded potential law school applicants*, employers and the public that ABA accreditation is a *sine qua non* of quality and should be regarded as essential even in states (like Massachusetts) where the graduates of an unaccreditated school such as MSL can take the bar examination and practice law.

Here Velvel is not talking about injury to MSL, but to the reason why he feels ABA has an accreditation monopoly. He goes on, however,

> Many other persons who would otherwise apply to and attend MSL will not do so even though they wish to practice law in Massachusetts, where MSL graduates can take the bar

merely rendered its opinion about whether the plaintiff met certain quality standards and that this opinion is protected speech under the First Amendment. There is support for ABA's position. *See, e.g., Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397 (7th Cir. 1989); *Zavaletta v. American Bar Ass'n*, 721 F.Supp. 96, 98 (E.D. Va. 1989). Plaintiff maintains that ABA's argument "is patently frivolous."

It is axiomatic that the First Amendment protects speech, not action. Thus, the speech component involved in ABA's promulgation of standards is protected by the First Amendment and, because the Constitution trumps the Sherman Act, this speech component cannot be the basis for antitrust liability. However, any *conduct* associated with the standards is not entitled to First Amendment protection. Put differently, the *conduct* forming the basis of a restraint of trade or a monopolization is outside the First Amendment's reach. This flows logically from section 1 of the Sherman Act which requires "concerted *action* that unreasonably restrains trade."

> examination and practice law. The reason [these people] will not apply to MSL is that *the ABA has persuaded them and others that a law school cannot be a quality law school if it is not ABA accreditated.*

(Velvel Aff., 3/22/95, at ¶ 27, ¶ 28(a) (emphasis added)).

This statement merely points out what the ABA contends are the benefits of its accreditation product. While the corollary of attending an accredited school is not attending a school that has not been accredited, the injury remains incidental to the government's action. There is nothing wrong with the ABA's marketing its product -- nothing wrong with its contending that its evaluation process provides benefits to prospective students and to the profession. The fact that various states agree does not make what ABA does unlawful.

Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pennsylvania, 745 F.2d 248, 256 (3d Cir. 1984) (emphasis added)

Thus, in *Allied Tube*, the First Amendment did not insulate a trade association where the association's members included consumers, distributors, and manufacturers, and any agreement to exclude a particular product from certification was "an implicit agreement not to trade in that type of [product]." *Allied Tube*, 486 U.S. at 508. This implicit agreement--not the act of promulgating the standards--was the conduct forming the basis for antitrust liability. In fact, the Court explicitly emphasized that antitrust laws circumscribe the "conduct" of standard-setting associations. *Id.* at 506, *see also National Soc'y of Professional Eng'r, Inc. v. United States*, 435 U.S. 679 (1978) (antitrust violation properly asserted against association whose members *boycott* those manufacturers which do not follow association's position). Conversely, in *Schachar*, the court found no antitrust violation where a medical association publicly stated its belief that a surgical procedure was "experimental" and should not be performed absent more research. The association did not require its members to desist from performing the operation or forbid its members from associating with those who chose to perform the operation. 870 F.2d at 398. Unlike *Allied*, where the association's promulgation of standards led to conduct that could be the basis for antitrust liability, the association in *Schachar* merely stated its position. It took no action on which to predicate antitrust liability. By merely stating its position, the association in *Schachar* did not "restrain trade" or monopolize the industry *vis-a-vis* the association in *Allied* which restrained trade by implicitly agreeing not to trade in a product. *See also Consolidated Metal Prods. v. American*

Petroleum Inst., 846 F.2d 284, 293 (5th Cir. 1988) (holding no antitrust violation where trade association provides information but does not constrain others to follow its recommendations), *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478 (1st Cir. 1988) [41]

When an association merely states its position, and a company is stigmatized because of that statement, there is no basis for antitrust liability.[42] ABA's constitutionally protected expression of its views and any resulting stigma that MSL suffers do not amount to ABA *conduct* on which to establish

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[41] MSL reasons that if extended to its logical extreme, this First Amendment analysis would protect "discussions by price fixing conspirators about the reasonable level at which prices should be adhered to in the marketplace...." (Pl.'s Resp. to Def. ABA's Mot. for Summ. J. at 30). However, the problem with MSL's reasoning here is that the illustration that it cites as the "logical extreme" involves *conduct*--conspiring to fix prices. In fact, in order for a conspiracy to fix prices to be actionable, there must be an *overt act*. *United States Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986 (11th Cir. 1993). This *act* or *conduct* is not protected by the First Amendment. MSL concedes as much when it states that this First Amendment rationale "can fare no better than an argument that the restrictive trade association *activities* involved in *Allied Tube* should be exempt from the antitrust laws...." (Pl.'s Resp. to Def. ABA's Mot. for Summ. J. at 30 (emphasis added)). *Allied* involved restrictive *activities*, not expression. Moreover, it is a fallacy to suppose that just because a core concept of antitrust law cannot logically be extended indefinitely that the core concept is faulty.

[42] This is different from the situation where an association states its position and then engages in conduct related to its stated position because where there is *conduct*, there is a basis for antitrust liability--the association has gone *beyond expression*.

potential antitrust liability.[43] Like *Schachar*, ABA does not restrain trade or monopolize an industry by speaking out on an issue. ABA is entitled to state its position, provided it does not go further and somehow penalize those who do not subscribe to its position. *See Schachar*, 870 F.2d at 399 ("An organization's towering reputation does not reduce its freedom to speak out"). If stigma results from simple expression, that stigma is incidental to the speech and cannot be the basis for antitrust liability. For example, in *Schachar*, the court found that the surgeons who performed the surgery were stigmatized by the association's warning and that this stigma led to a drop in business.[44] However, the court did not find any antitrust

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[43] The governmental decision to exclude graduates of unaccreditated schools from taking certain bar examinations is protected under *Noerr*. Because governmental action is responsible for this injury, ABA *conduct* is *not*.

[44] MSL might attempt to distinguish the *Schachar* analogy by reasoning that, unlike the plaintiff in that case, it challenges ABA *standards* not ABA accreditation decisions. However, this is a distinction without a difference. No doubt, the association in *Schachar* maintained some standards. One standard might have provided that:

> a procedure is termed "experimental" until it has undergone two years of testing.

However, even if the association maintained such a standard, there is no *conduct* on which to base antitrust liability because by promulgating this standard, the association has done nothing more than to express its views on when a procedure is safe to perform. The situation would be different if the association's standard provided that:

> a procedure is termed "experimental" until it has undergone two years of testing and no member of the association shall deal or otherwise transact business with a doctor who performs

violation. This conclusion is sound. A contrary result leads to the anomalous situation that antitrust liability would attach to associations that put persuasive speech into the marketplace of ideas but not to those that put forth fluff. Antitrust laws do not exist to stifle the effects of speech. They exist to protect consumers and to stop conduct that disrupts the marketplace. Thus, any stigma that MSL has suffered because of ABA's not listing MSL as an accreditated school does not provide the necessary offensive conduct for antitrust liability.

It is clear that ABA does not violate the Sherman Act when it merely publishes quality standards or expresses its views on which schools provide quality educations. Publication of an association's views, without more, is protected speech. Only ABA *conduct* can trigger antitrust liability. Abstract stigma that flows from the publication of speech protected by the First Amendment is not enough.

The plaintiff in *Allied* produced plastic electrical conduit. Law schools *produce* educations. The association in *Allied* violated the antitrust laws by requiring its members not to deal with manufacturers of plastic conduit. This *conduct* violated the Sherman Act. ABA would violate the Sherman Act if it required its members not to deal with unaccreditated schools (analogous to the manufacturers of plastic conduit in *Allied*). For example, ABA could not tell its members not to teach at unaccreditated schools (limit the supply of production

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"experimental" procedures.

In this latter scenario, the association has engaged in *conduct* directed at restraining trade. However, there was no such conduct in *Schachar* as there is no such *conduct* in the instant case.

resources), work with graduates of unaccreditated schools (limit customer base), or refer cases to graduates of unaccreditated schools (interfere with the manufacturer's business). However, ABA does none of these things. It does not keep its members from hiring graduates of unaccreditated law schools. It does not restrict its members from making referrals to graduates of unaccreditated law schools. It does not forbid its members from dealing with graduates of unaccreditated law schools. It does not stop its members from teaching at unaccreditated law schools. It does not prevent graduates of unaccreditated law schools from joining ABA.[45] In fact, ABA in *no* way *acts* against schools that fail to satisfy its quality standards.[46] It does not even review schools that do

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[45] A quick search in Martindale-Hubbel revealed that at least six MSL graduates have already joined ABA.

[46] In its complaint, MSL points out that its students cannot transfer their credits to ABA accreditated law schools, and its students cannot obtain LL.M. degrees from ABA accreditated law schools. (Complaint ¶¶ 37(d), 37(e)). Although an argument might be made that these two rules amount to ABA conduct, I find that such alleged conduct is insufficient to preclude summary judgment. First, MSL has not produced *any* evidence indicating that it has been injured because of these two ABA rules. In fact, there is evidence indicating that MSL vigorously attempts to frustrate any student from transferring to an ABA-accreditated law school by withholding transcripts and generally not cooperating with transfer efforts. In one instance, an MSL student needed to commence a lawsuit against the school to release her transcripts. *Riley v. Massachusetts School of Law, Inc.*, No. 91-910 (Sup. Ct. Mass.) Mr. Velvel had refused to cooperate with the student's transfer efforts because he maintained that the student had entered the school in bad faith, not intending to graduate, but instead planning all along to transfer to an accreditated school. Moreover, the council in charge of higher education in Massachusetts noted:

not wish to be considered for accreditation. If they wish, schools can simply disregard ABA's standards.[47] ABA imposes no penalty on these schools and the injury associated with the governmental action to preclude graduates of unaccreditated schools from sitting for some bar examinations is not ABA conduct. Indeed, ABA engages in no conduct that can trigger antitrust liability.[48] It merely expresses its views on

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> we continue to receive complaints from students who are unable to resolve complaints on their own with the law school. This includes the law school's refusal to accept certified mail from students, and difficulties in obtaining transcripts and other information from various members of the administrative staff.

(Def.'s Ex. D to Mot. for Summ. J., at 3).

Second, these ABA rules are essentially extensions of the protected speech. ABA's speech would be meaningless if students of unaccreditated schools could shoe-horn their unaccreditated credits into an ABA accreditated law school.

[47] In fact, if a school disagrees with the standards, it should not simply pay lip service to them. Indeed, at least some members of MSL's faculty appear to agree with this sentiment as Mr. Velvel noted that "[t]here are people on our faculty who believe we'd be better off without [ABA accreditation]." Dick Dahl, *Massachusetts Weekly*, January 18, 1993, "A Maverick Law School's Maverick Pitch."

[48] Nor do any of the other defendants engage in conduct detrimental to MSL's ability to compete for customers. Just like ABA, these other defendants may express opinions about quality within the profession, but they take no affirmative action. MSL maintains that LSAC also excludes it from certain LSAC recruitment forums. (Plf.'s Resp. to ABA's Mot. for Summ. J., Vol. II, at 120). MSL might contend that this is "conduct" which, through its conspiracy theory, is relevant in taking this case outside of the First Amendment's protection. However, as Judge Easterbrook noted in *Schachar*, "[a]ntitrust law does not compel your

which law schools employ sound teaching methods. Such expression is protected under the First Amendment and cannot be the basis for Sherman Act liability.

IV. CONCLUSION

The ABA, in the view of the 50 states, is quite good at setting standards for legal educators. As evidence of this, each state has concluded that graduation from an ABA accreditated law school is a sufficient basis to sit for its bar examination. The fact that the ABA has a reputation for being good at what it does, and that the states have elected to rely on the ABA accreditation process, does not transform that process, which is itself binding on absolutely no one absent state action, into an antitrust violation. If, the effect of governmental reliance on ABA accreditation decisions is to "freeze out" lower income people, to raise faculty salaries unfairly, and to require law schools to have too many books on their shelves, then any disgruntled law school, dean, student, or citizen can petition the state legislature to abandon its reliance on the ABA process. The answer is not to assail the ABA which has no authority over who may sit for bar examinations. The answer is to utilize the democratic process, for it is that process that gives force to the standards. Plaintiff's alleged injury that flows from governmental decisions to preclude graduates of unaccreditated law schools

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competitor to praise your product or sponsor your work. To require cooperation or friendliness among rivals is to undercut the intellectual foundations of antitrust law." 870 F.2d at 399. MSL cannot use the Sherman Act to compel LSAC, one of the organizations that administers the LSAT which MSL has publicly rejected as racially biased and unreliable, to assist MSL in marketing its product.

from sitting for certain bar examinations, is protected under *Noerr*, and cannot be the basis for ABA liability.

If MSL is independently stigmatized because of ABA's denial of accreditation, that injury results from ABA's protected freedom of expression and not because of ABA's conduct. The Sherman Act regulates conduct, not speech. No factfinder could reasonably conclude that ABA has engaged in conduct that triggers antitrust liability.

Finally, judgment should also be entered in favor of the other defendants in this case. In its complaint, MSL contends that the ABA's adoption and approval of the *standards* have the purpose and effect of restraining trade and that the defendants have worked in concert, using some of the ABA's standards, to monopolize the law school accreditation process. As I have found that maintaining the standards does not violate the Sherman Act, there is no basis for liability against the other defendants either. I will therefore enter judgment in their favor as well.[49] An appropriate order follows.

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[49] As I have found that MSL's alleged harm is not a proper basis for recovery, I need not consider the other grounds for summary judgment raised in ABA's motion.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, INC.	:	CIVIL ACTION No. 93-6206
vs.	:	
AMERICAN BAR ASSOCIATION, et al.	:	

ORDER

AND NOW, this 29th day of August, 1996, the American Bar Association's motion for summary judgment is hereby granted and judgment is entered in favor of the American Bar Association, Law School Admission Services (LSAS), Law School Admission Council (LSAC), and the Association of American Law Schools (AALS), and against plaintiff on all counts. It is hereby further ordered that the motions for summary judgment submitted by AALS, LSAS, and LSAC are denied as moot.

BY THE COURT:

s/ J. William Ditter, Jr., J.

FILED AUGUST 29, 1996

ENTERED: 8·30·96
CLERK OF COURT

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.